UBA URUS BINA ASIA SDN BHD v. QUIRK & ASSOCIATES SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM J
[CIVIL APPEAL NO: 13C-1-11-2015]
9 DECEMBER 2015

CIVIL PROCEDURE: *Stay of proceedings – Application for – Stay of suit pending reference to arbitration – Order of stay granted without conditions – Court directed defendant to refer dispute to arbitration or forgo its right to arbitrate during subsequent case management – Whether court functus officio once order for stay perfected – Whether subsequent directions during case management null and void – Whether appropriate case for court to exercise revisionary powers and prevent substantial injustice – Courts of Judicature Act 1964, ss. 32, 33, 34, 35 & 36*

ARBITRATION: *Stay of proceedings – Application – Stay of suit pending reference to arbitration – Order of stay granted without conditions – Court directed defendant to refer dispute to arbitration or forgo its right to arbitrate during subsequent case management – Whether court functus officio once order for stay perfected – Whether subsequent directions during case management null and void – Arbitration Act 2005, s. 10(1), (2)*

The plaintiff was appointed to carry out certain renovation and/or interior fit out works on the premises of the second defendant. The first defendant was the second defendant's consultant in relation to the works. The plaintiff's claim was for monies outstanding for works done against both the defendants. However, the plaintiff subsequently withdrew its claim against the first defendant. The second defendant proceeded to file an application *vide* encl. 5 seeking *inter alia*, an order for a stay of the proceedings in court pursuant to s. 10 of the Arbitration Act 2005 ('the Act'). On 30 September 2015 the Sessions Court Judge allowed the second defendant's application with costs pursuant to s. 10(1) of the Act. The order for stay was granted without any conditions or terms imposed although the court had the power to do so under sub-s. 10(2) of the Act. However, during subsequent case management dates *ie*, 13 October 2015 and 5 November 2015, the court directed, *inter alia*, that the second defendant refer the matter to arbitration within seven days or forgo its right to arbitrate and submit to the jurisdiction of the court. In the circumstance, the second defendant urged the High Court to invoke its revisionary powers under the Courts of Judicature Act 1964 ('CJA') to address the miscarriage of justice on the grounds, *inter alia*, that (i) an unconditional stay of proceedings pursuant to s. 10 of the Act had been granted, therefore, the court's directions would render the stay order nugatory; (ii) the stay was not made conditional upon arbitration being on foot, proposed or brought, therefore, once the order had been perfected, the

defendant had nothing left to do and the court was *functus officio*; (iv) since the court was *functus officio*, no further order could be made nor direction given, therefore, any condition that the defendant refer the matter to arbitration was not valid.

Held (setting aside orders made after 30 September 2015):

(1) When an order for stay was granted under s. 10 of the Act, it was not to say that the court had no jurisdiction to hear the dispute in the first place, for the court had that jurisdiction. It, however, declined to do so because it had chosen to give effect to the parties' agreement to arbitrate their disputes. Hence, the words 'refer the parties to arbitration'. In short, there was an agreement to arbitrate rather than agreement to litigate. When the court granted an order of stay, the order was not dependent on arbitration or arbitration proceedings being afoot, proposed or brought; it was dependent on the very existence of an agreement to arbitrate. (para 22)

(2) There was no appeal following the decision of the Sessions Court Judge. At the material time of the making of the order, the court did not deem it fit impose any terms or conditions. If the court was of the view that conditions or terms ought to be imposed under sub-s. 10(2) of the Act, such terms or conditions ought to be imposed at the time the order of stay was granted. Once that order of stay under sub-s. 10(1) had been made, and the order had been sealed or perfected, there was nothing left before the court. The court was *functus officio* and did not concern itself nor does it need to concern itself with the mechanism or details of the procedure behind that reference to arbitration. Hence, the directions and decisions of the court given subsequent to 30 September 2015, especially on 5 November 2015, were clearly wrong and invalid. (paras 26 & 27)

(3) In granting the stay, the Sessions Court agreed with the second defendant that the plaintiff had to abide by the arbitration agreement to resolve the dispute in arbitration. The stay that was granted effectively recognised the sanctity of the arbitration agreement. Under such circumstances, to order the second defendant to refer the matter to arbitration failing which the second defendant was to be taken as having abandoned its right to refer to arbitration and to then file a defence, were highly improper orders. The court had ceased to have jurisdiction; hence *functus officio*. Such subsequent orders had indeed worked substantial injustice to the second defendant. (paras 29 & 31)

(4) This was an appropriate case for the court to exercise its revisionary powers and prevent substantial injustice. Once the order of the court granted on 30 September 2015 was perfected, the court was *functus officio*. The court had no power to revisit its earlier order for any reason, especially for the purpose of changing the order that was properly made after hearing the parties. (para 32)

Case(s) referred to:

AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC [2013] UKSC 335 ***(refd)***

TNB Fuel Services Sdn Bhd v. China National Coal Group Corp [2013] 1 LNS 288 CA ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 2, 10(1), (2), 11, 15, 18, 29, 37, 38, 39, 41, 42, 43, 44, 45, 46, 50

Courts of Judicature Act 1964, ss. 32, 33, 34, 35, 36

Rules of Court 2012, O. 69 rr. 1(2), 10

Rules of the High Court 1980, O. 69

For the plaintiff - Wan Idi Amin Ibrahim; M/s Idi Amin

For the 2nd defendant - Shannon Rajan (Karthini Mahendranathan with him); M/s Skrine

Reported by Sandra Gabriel

JUDGMENT

Mary Lim J:

[1] Through his solicitor's letter dated 9 November 2015, the second defendant requested the court to invoke its civil powers of revision under the Courts of Judicature Act 1964 (Act 91). The court has read that letter and has called for the relevant record of the proceedings in the court below.

[2] Having examined the record, the court called for the parties to attend so that they may assist in any clarification that may be required. The court has heard both parties and in the interests of justice, the court will intervene.

Powers Of Revision In Civil Matters Or Proceedings

[3] The court has powers of revision in civil matters or proceedings but this is rarely resorted to because of the availability of appeal. The powers of revision are set out in ss. 32 and 35 of the Courts of Judicature Act 1964 (Act 91). In exercise of its powers of revision, the court may call for the record of the civil proceedings before the subordinate court. The object or purpose of calling for such records is so that the court can satisfy itself as to the "correctness, legality or propriety" either of "any decision recorded or passed"; or "to the regularity of the proceedings" before the subordinate court:

> Power of the High Court to call for records of civil proceedings in subordinate courts
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> 32. The High Court may call for and examine the record of any civil proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any decision recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

General supervisory and revisionary jurisdiction of High Court

35.(1) In addition to the powers conferred on the High Court by this or any other written law, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts, and may in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested, at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof, and may remove the same into the High Court or may give to the subordinate court such directions as to the further conduct of the same as justice may require.

(2) Upon the High Court calling for any record as aforesaid all proceedings in the subordinate court in the matter of proceeding in question shall be stayed pending further order of the High Court.

[4] Section 36 of Act 91 provides that there is no right to be heard unless there is provision to the contrary in any other written law. However, in view of the terms in the proviso to s. 36, that no final order is to be made to the prejudice of any person unless that person has had an opportunity to be heard, it is only prudent and in the interests of justice that the court hears any of the affected parties before exercising this power of revision:

Discretion of Court as to hearing parties

36. Subject to any written law for the time being in force no party shall have any right to be heard before the High Court when exercising its powers of revision and supervision:

Provided that no final order shall be made to the prejudice of any person unless the person has had an opportunity of being so heard.

[5] In this case, the court has heard the relevant parties involved.

[6] In the exercise of its civil powers of revision, the court must also have regard to s. 34. This section provides that the court should not exercise this power of revision where the decision in the civil matter is one where the party could have filed an appeal:

No revision at instance of party who could have appealed

34. Where an appeal lies from any decision in any civil matter, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of a party who could have appealed

[7] There are two elements here. First, the decision which is brought to the attention of the High Court must not be one which could have been taken on appeal. Second, the party who seeks to invoke these powers cannot be the party who could have appealed against that decision. Where the decision complained of is one which could have been appealed against, s. 34 provides

that the court must not entertain any application for revision of the same. In other words, the court must be vigilant to guard against abuse and recourse to this avenue of revision by parties who may have fallen foul of the appeal mechanisms for one reason or other.

[8] Where the court is satisfied that the instant case is a suitable case for revision, the court has fairly extensive powers under s. 33 on the orders that may be made; including an order directing a new trial to be conducted:

> Power of High Court on revision of civil proceedings
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> 33. In the case of any civil proceedings in subordinate court the record of which has been called for, or which otherwise comes to its knowledge, the High Court may give such orders thereon, either by directing a new trial or otherwise, as seems necessary to secure that substantial justice is done.

[9] In determining what orders may be appropriate to make, the court is guided by the considerations of securing "substantial justice". In this case, the court has found this test satisfied.

The Relevant Facts

[10] The relevant facts are as set out in the solicitor's letter of 9 November 2015 and from the court records.

[11] By letter of award dated 5 May 2011 issued by the first defendant, the plaintiff was appointed to carry out certain renovation and/or interior fit out works on the premises of the second defendant. The first defendant is the second defendant's consultant in relation to the works. The plaintiff claimed to have carried out works including additional works for which it has not been fully paid. The claim is for the monies outstanding.

[12] The second defendant filed an application seeking, *inter alia*, an order for a stay of the proceedings in court pursuant to s. 10 of the Arbitration Act 2005. The application was opposed; by the first defendant on the basis that it is not a party to the arbitration agreement or even the underlying agreement between the second defendant and the plaintiff; and by the plaintiff on the basis that the arbitration clause "cuma mencadangkan pihak-pihak supaya merujuk timbang tara dan peruntukannya bukanlah mandatori".

[13] On 30 September 2015, the plaintiff withdrew the claim against the first defendant. The court accordingly struck out the claim with no liberty to file afresh and with costs of RM2,000.

[14] On that same date, the second defendant's application listed as encl. 5 was also heard. After hearing both counsel and upon considering all related papers, the learned Sessions Court Judge allowed the second defendant's application for stay under s. 10 together with costs of RM2,000 to be paid by the plaintiff to the second defendant. The court further fixed the case for case management on 13 October 2015.

[15] According to the second defendant's solicitor's letter to this court, this is what happened on 13 October 2015 and on the two subsequent case management dates:

> ... The Court then set 13.10.2015 as a case management date for the parties to discuss between themselves on who would refer the matter to arbitration and update the Court on actions that have been taken to refer the matter to arbitration.
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> 4. On 13.10.2015, the Court asked for an update on the status of the reference of the matter to arbitration. The Plaintiff's lawyer stated that his instructions were not to refer the matter to arbitration and that since the Defendant initiated the stay application, the Defendant should be the one who should refer the matter to arbitration. The Defendant's lawyer responded that the stay application was initiated as the Plaintiff did not use the agreed forum and that the Court should respect the parties' arbitration agreement. The Defendant's lawyer also stated that the Defendant was not seeking any relief from the Plaintiff and maintained that the Defendant is ready and willing to defend the arbitration should the Plaintiff refer the matter to arbitration.
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> 5. The Court then directed that the Defendant:
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> (i) refer the matter to arbitration; and
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> (ii) file an affidavit at every upcoming case management to update the Court on the steps taken towards arbitrating the matter
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> and set the next case management date on 29.10.2015.
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> 6. The Defendant is unable to comply with this direction for the reasons as listed in the attached note (Tab 3) together with legal authorities (Tab 4) which the Defendant's lawyer provided the Court and the Plaintiff's lawyer on 29.10.2015. The Defendant's counsel also made oral submissions on that day. The Court then asked that the Plaintiff carry out research on the said issue and for both parties to appear before her on 5.11.2015.
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> 7. On 5.11.2015, when asked to submit on Section 10(2) of the Arbitration Act 2005, the Defendant's lawyer submitted that the court could not impose conditions after the order was made staying the proceedings and produced a Singaporean High Court case, *the Evmar* [1989] 1 SLR(R) 433 (Tab 5(a)) to that effect. The Judge and the Plaintiff's lawyer were also handed a copy of the High Court case of *Phuah Beng Chooi & Ors v. Koh Heng Jin & Ors* [2007] 2 MLJ 458 (Tab 5(b)) wherein it was held that once an order has been perfected, the court is *functus officio* and has no power to vary or set aside the order, save for clerical slips.
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> 8. After hearing both parties, the Judge said that her previous direction (delivered on 13.10.2015) that the Defendant refer the matter to arbitration and to depose an affidavit to the steps taken be maintained. She also directed that the Defendant refer the matter to arbitration within 7 days or forgo its right to arbitrate and to instead file a defence within

the 7 days (ending 13.11.2015) and directed that an affidavit is to be deposed to the effect that the matter is referred to arbitration, if that is the case.

[16] This court has verified all the above from the Sessions Court's records. On 30 September 2015, the court granted the second defendant's application for a stay under s. 10 of the Arbitration Act 2005:

Untuk L5 NP Def 2 (Timbangtara) dibenarkan dengan sebanyak RM2,000.00 dan CM pada 13/10/2015 untuk arbitration.

[17] This order of court is reflected in the perfected order:

PERINTAH 30 SEPTEMBER 2015

MAKA ADALAH DIPERINTAHKAN bahawa permohonan Defendan Kedua untuk penggantungan semua prosiding selaras Seksyen 10 Akta Timbangtara 2005 adalah dibenarkan dengan kos sebanyak RM2,000.00 dibayar oleh Plaintif kepada Defendan Kedua.

[18] As for the proceedings on 5 November 2015, this is what was recorded:

Mah: perintah mahkamah terhadap arahan untuk defendan merujuk perkara ini kepada abitrator dan mendeposkan affidavit adalah kekal. Mahkamah juga mengarahkan defendan melakukan arahan tersebut dalam tempoh 7 hari dari tarikh ini. Jika gagal, defendan adalah dianggap mengetepikan haknya untuk merujuk kepada abitrator dan hendaklah memfailkan pembelaan dalam tempoh 7 hari tersebut.

Mah: 16/11/2015 (CM)

[19] Having verified these details, I can see why the second defendant would be so concerned to the extent of writing in to the High Court urging the court to invoke its revisionary powers and address the "miscarriage of justice". The arguments canvassed by the second defendant before the court this morning are reflected in the ninth paragraph of the solicitor's letter:

9. The direction that the Defendant be compelled to refer the matter to arbitration or give up its right to arbitrate and submit to the jurisdiction of the Court should be reviewed on these grounds, and of which grounds (a) to (e) have been raised before the Sessions Court:

(a) An unconditional stay of proceedings pursuant to S.10 of the Arbitration Act 2005 had been granted. The Court's directions would render the stay order nugatory in effect.

(i) The stay was not made conditional upon arbitration being on foot, proposed or brought. Once the order has been perfected, the Defendant has nothing left to do.

(ii) The Court could only impose conditions at the time the order was made staying the proceedings. (paragraph 19, page 441, *the Evmar* [1989] 1 SLR(R) 433 (Tab 5(a)).

(iii) Once the stay order had been perfected, the Court is *functus officio*. (paragraph 27, page 481, *Phuah Beng Chooi & Ors v. Koh Heng Jin & Ors* [2007]2 MLJ 458 (Tab 5(b))

(iv) As the Court is *functus officio*, no further order can be made nor direction given.

(b) Any condition that the Defendant refer the matter to arbitration is not valid.

In each case, it is on the face of it, for either party to commence any arbitration it wishes at any time, or not to do so.

(Paragraph 23, page 343 of *AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 335 (Tab 4(a))

(c) The Court's reasoning for directing the Defendant to refer the matter to arbitration was that the Defendant was the party who sought the stay application and thus is the right person to refer the matter to arbitration. This is flawed as the Defendant applied for the stay to exclude the Court as an option of dispute resolution between the parties, and leave the Plaintiff in the position of having no other remedy than to proceed by arbitration. The effect of the stay is to preclude the Court from granting relief to the Plaintiff as the Plaintiff is not using the agreed forum, i.e. arbitration. (pages 268 and 269 of *Doleman & Sons v. Ossett Corporation* [1912] 3 KB 257 (Tab 4(b))

[20] The order of the Sessions Court granted on 30 September 2015 is quite clear. The court had agreed with the second defendant's arguments and the proceedings in court were stayed pursuant to sub-s. 10(1). That order of stay was granted without any conditions or terms imposed at the material time that it was made although the court had the power to do so under sub-s. 10(2):

Arbitration agreement and substantive claim before court

10.(1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit.

[21] A stay of court proceedings under s. 10 of the Arbitration Act 2005 is sometimes misunderstood or confused with the general order of a stay. In any other case, an order of stay has the effect of staying or suspending some matter or proceedings in the first court pending the outcome of another matter or proceedings, perhaps in another court, and that may include a stay pending an appeal. However, in the case of a stay under s. 10, that is not the effect nor the purpose why the stay is sought or granted.

[22] When an order for stay is granted under s. 10, it is not to say that the court has no jurisdiction to hear the dispute in the first place for the court has that jurisdiction. It, however, declines to do so only because it has chosen to give effect to the parties' agreement to arbitrate their disputes. Hence, the words "refer the parties to arbitration". By that agreement to arbitrate, or the arbitration agreement, the parties have made their choice of forum resolution of dispute and that is the basic concept behind party autonomy. In short, there is an agreement to arbitrate rather than agreement to litigate. When the court grants an order of stay, the order is not dependent on arbitration or arbitration proceedings being afoot, proposed or brought; it is dependent on the very existence of an agreement to arbitrate.

[23] In the Supreme Court of the United Kingdom's decision in *AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 335 at p. 343, Lord Mance opined that:

> A stay is not made conditional upon arbitration being on foot, proposed or brought. If there is power under s. 37 of the 1981 Act to injunct the commencement or continuation of foreign proceedings, no reason is evident why the exercise of this power should depend upon such a condition. In each case it is, on the face of it, for either party to commence any arbitration it wishes at any time, or not to do so.

[24] At p. 351, His Lordship expressed that it was in his opinion the "better view" that the grant of an injunction to stay foreign proceedings which are seen to be in breach of the arbitration agreement is not because the court's general power to act and hear these matters are excluded, but "for the purposes of and in relation to the negative promise contained in the arbitration agreement not to bring foreign proceedings, which applies and is enforceable regardless of whether or not arbitral proceedings are on foot or proposed".

[25] Once the conditions for a stay have been met, the matter of stay is mandatory - see *TNB Fuel Services Sdn Bhd v. China National Coal Group Corp* [2013] 1 LNS 288; [2013] 4 MLJ 857:

> 24. The present form of section 10 of the Arbitration Act 2005 is the result of the amendment to that section which came into force on 1st July 2011 [Act A1395]. It is generally accepted that the effect of the amendment is to render a stay mandatory unless the agreement is null and void or impossible of performance. The Court is no longer required to delve into the facts of the dispute when considering an application for stay. Indeed, following the decision of the Court in *CMS Energy Sdn Bhd v. Poscon Corporation* (*supra*), a Court of law should lean towards compelling the parties to honour the 'arbitration agreement' even if the Court is in some doubt about the validity of the 'arbitration agreement'. This is consistent with the 'competence principle' that the arbitral tribunal is capable of determining its jurisdiction, always bearing in mind that recourse can be had to the High Court following the decision of the arbitral tribunal.

[26] Here, there was no appeal following the decision of the learned Sessions Court Judge. More important and of relevance for our present purpose is that at the material time of the making of the order, the court did not deem it fit impose any terms or conditions to the order of stay that was granted. If the court was of the view that conditions or terms ought to be imposed under sub-s. 10(2), such terms or conditions then ought to have been imposed at the time the order of stay was granted. Once that order of stay under sub-s. 10(1) has been made, and the order has been sealed or perfected; there is nothing left before the court. The court is clearly *functus officio*. The court does not concern itself nor does it need to concern itself with the mechanism or details of the procedure behind that reference to arbitration. That is left entirely to the parties.

[27] In this case, the order of the Sessions Court dated 30 September 2015 was a complete order granted with no other terms except an order as to costs. Hence, the directions and decisions of the court given subsequent to that date, especially on 5 November 2015, whether under sub-s. 10(2) or otherwise, are clearly wrong and invalid. These orders made after 30 September 2015 are certainly not orders or decisions that are appealable given that they do not form part of that order of 30 September 2015.

[28] Hence, I can appreciate the concerns of the second defendant, that the new orders or directions of the court will have the following effect, again as set out at para. 9 of the said letter:

> (d) The PAM Arbitration Rules 2015 which apply in this matter do not permit a Defendant to initiate the arbitration process. It is the Claimant who has to file its claim. The Rules make it mandatory for the party referring the mater to arbitration to describe the nature and circumstances of the dispute and specify the relief claimed (Tab 4(c)). The Defendant is not seeking any relief from the Plaintiff.
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> (e) There is a costs element. The Defendant would have to pay the application fee (which works as an upfront deposit) of RM5,000 which is to accompany the application from before the arbitration is regarded as commenced under Article 2.1 PAM Arbitration Rules 2015 (Tab 4(c)). This should be done by the Plaintiff.
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> (f) The Plaintiff is in breach contract when it seeks to ignore the arbitration agreement between the parties and resort to seeking relief from the Court instead. By ordering the Defendant to commence the arbitration in default of which the Court will be seized of the matter, the Court is condoning and actively upholding the Plaintiff's breach of contract.
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> The negative aspect of an arbitration agreement (the negative promise not to bring proceedings elsewhere) is a feature shared with an exclusive choice of court clause. In each case, the negative aspect is a fundamental as the positive. There is no

reason why a party to either should be free to engage the other party in a different forum merely because neither party wishes to bring proceedings in the agreed forum.

(Paragraph 21, page 343 of *AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 335 (Tab 4(a))

(g) The Judge repeatedly mentioned that this would not be the first case wherein the Defendant was made to refer the matter to arbitration and that many Defendants before this have referred the dispute to arbitration. We seek High Court intervention to put right this misunderstanding on the arbitration process.

10. The Defendant is suffering a miscarriage of justice. We request that the High Court exercise its revisionary powers under sections 32, 33 and 35 of the Courts of Judicature Act in relation to the directions given by the Sessions Court Judge on 13.10.2015 and 5.11.2015. The Defendant is to meet the Plaintiff's case in the arbitration and not to be compelled to file a case. This is tantamount to a Defendant filing an action in Court which is an impossibility.

[29] In granting the stay, the Sessions Court must have agreed with the second defendant that the plaintiff has to abide by the arbitration agreement to resolve the dispute in arbitration. The stay that was granted effectively recognised the sanctity of the arbitration agreement.

[30] Counsel for the plaintiff had sought to explain the matter of costs involved in taking the matter to arbitration and that it wants the second defendant to commence and pay for the arbitration proceedings. With respect, these matters if at all, are relevant, should be canvassed at the time of the hearing of the stay application and not, now. These are also matters which are of no concern to the court as the parties will have to stand by their arbitration agreement.

[31] Under such circumstances and as explained by the second defendant's counsel, to now order the second defendant to refer the matter to arbitration failing which the second defendant is to be taken as having abandoned its right to refer to arbitration and to then file a defence; are highly improper orders. The court has ceased to have jurisdiction, hence *functus officio*. Such subsequent orders have indeed worked substantial injustice to the second defendant.

[32] This is indeed an appropriate case for the court to exercise its revisionary powers and prevent substantial injustice. Once the order of the court granted on 30 September 2015 is perfected, the court is *functus officio*. The court has no power to revisit its earlier order for any reason, especially for the purpose of changing the order that was properly made after hearing the parties.

[33] I feel compel to add that the Sessions Court's remarks that defendants in other cases have been "made to refer the matter to arbitration and that many defendants before this have referred the dispute to arbitration", are inappropriate. Just because the Sessions Court has made similar subsequent orders is certainly not a relevant or valid reason why the present subsequent orders can be validly made and, be allowed to remain.

[34] The direction of the court "that the defendant be compelled to refer the matter to arbitration or give up its right to arbitrate and submit to the jurisdiction of the court" is clearly wrong and invalid for the reasons already discussed; and it has certainly caused a miscarriage of justice.

[35] I also feel compel to observe that the present position may have arisen due to the use of the term "court" in sub-s. 10(1). Prior to the amendments to the Subordinate Courts Act 1948 (Act 92) *vide* Subordinate Courts (Amendment) Act 2010 (Act A1382) which came into force on 1 March 2013 (PU(B) 45-2013), the monetary limits of the subordinate courts, in particular the Sessions Court was two hundred and fifty thousand ringgit and below.

[36] In relation to the powers to grant orders for stay under s. 10, such applications were invariably before the High Court. The simple reason for this was because more often than not, the claims themselves were frequently beyond the financial limits of the subordinate courts' jurisdictions. The underlying contracts were usually contracts involving values of more than two hundred and fifty thousand ringgit and with provisions for resolution of disputes by arbitration. Hence, orders under s. 10 were almost always sought before the High Court.

[37] Unlike ss. 11, 15, 18, 29, 37, 38, 39, 41, 42, 43, 44, 45, 46 and 50 of the Arbitration Act 2005, where the word "court" is specifically identified as the "High Court", the words used in s. 10 is "a court". Arguably, this will include the Magistrates and Sessions courts as the term "court" is not defined in s. 2 of the Arbitration Act 2005; but the term "High Court" is. With the amendments to the financial limits of the subordinate courts, applications for orders under s. 10 can properly come within the jurisdiction of the subordinate courts.

[38] However, s. 50 of the Arbitration Act which provides that applications to the High Court under the Act shall be by way of an originating summons; and the Rules of Court 2012 may need to be relooked at. Given that there is now a common set of Rules of Court governing procedures in both the High Court and the subordinate courts, s. 50 may have become redundant while O. 69 of the new Rules of Court 2012 may need some tweaking.

[39] Order 69 of the old Rules of the High Court 1980 dealt specifically with arbitration and arbitration related matters. When the new Rules of Court were enacted in 2012, O. 69 was retained with updates. However, O. 69 envisages arbitration and matters under the Arbitration Act 2005 to be heard and disposed of by the High Court - see O. 69 sub-r. 1(2). There

is nothing mentioned of the role of the subordinate courts even though there is a specific provision on stay at O. 69 r. 10. There is, therefore, a need to also relook at O. 69 to deal with this slight variance.

[40] For all the reasons discussed above, I hereby set aside all orders of the court made after 30 September 2015, especially those made on 13 October 2015 and 5 November 2015. The case management on 16 November 2015 is further vacated.